

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Peoples Energy Services Corporation)	
)	
Petition for Relief to Protect Portions of)	
PE Services' Report of Continued)	
Compliance as an Alternative Gas)	Docket No. 08-0057
Supplier from Disclosure for Not Less)	
Than Five Years in Order to Protect)	
Highly Confidential and Proprietary)	
Information.)	

**BRIEF ON EXCEPTIONS
OF
PEOPLES ENERGY SERVICES CORPORATION**

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Dated at Chicago, Illinois
this 18th day of March, 2008

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Brief on Exceptions of Peoples Energy Services Corporation

1 Pursuant to Section 200.830 of the Illinois Commerce Commission's
2 ("Commission") Rules of Practice (83 Ill. Admin. Code §200.830) and the
3 schedule established by the Administrative Law Judge, Peoples Energy Services
4 Corporation ("PE Services"), files its Brief on Exceptions to the Administrative
5 Law Judge's Proposed Order ("ALJPO") in the above-captioned proceeding.
6 Attachment A of this Brief sets forth PE Services' proposed modifications to the
7 ALJPO.

8 **I. INTRODUCTION**

9 PE Services, as required by the Commission's rules governing alternative
10 gas suppliers, submitted an annual report on its compliance status. 83 Ill. Admin.
11 Code §551.120. As required by Section 551.120, PE Services filed its report with
12 the Chief Clerk. Section 551.120(c) states that the report is "open to public
13 inspection, unless otherwise ordered by the Commission." One aspect of PE
14 Services' report was to show its ability to meet the financial reporting

requirements. As permitted by Section 551.140(a) of the Commission's rules, PE Services included an Experian "Intelliscore" report to meet this requirement. 83 Ill. Admin. Code §551.140(a). PE Services requested confidential treatment of this report. The ALJPO rejected this request.

II. SUMMARY

Confidential treatment of the Experian Intelliscore report (the "Report") is appropriate for two reasons.

First, Experian's report applies Experian's proprietary analytical method to PE Services' proprietary financial information to generate a score. The resulting data are not generally available to the public. Rather, an Experian credit score report is only available to an entity that purchases the service from Experian and agrees to Experian's terms and conditions for using such a report. As Section 7(1)(g) of the Illinois Freedom of Information Act recognizes, financial information can be confidential. 5 ILCS 140/7(1)(g).

Second, confidential treatment is consistent with Commission precedent.

III. ARGUMENT

A. The Report Is Confidential

The ALJPO is correct that anyone may purchase from Experian a commercial score report for PE Services. ALJPO at 4. However, as that statement shows, such reports are available to subscribers or purchasers. They are not generally available to the public, as the Report would be were it published as a public unredacted document on e-docket or included in the Chief Clerk's

files without confidential protection.¹ Moreover, such reports are available only under restrictions that the report's issuer chooses to impose pursuant to an agreement with the purchaser. Experian determines the terms and conditions under which it will make its analysis available to third parties. It has no obligation to provide the information to anyone under other circumstances.

PE Services provided the information to the Commission, with a request for confidential treatment, solely to meet a regulatory requirement. Bluestar Energy Services, Inc. v. Illinois Commerce Commission, 374 Ill. App. 3d 990, 995 (1st Dist. 2007) ("Bluestar") ("Although the settlement agreement between Ameren and the Coalition does not contain trade secrets in the conventional sense, it is confidential information received by a government agency from an entity that the agency regulates.") To remain certificated to sell gas to small volume gas users, PE Services must provide some sort of financial information to the Commission (83 Ill. Admin. Code §551.140), and, especially for an entity without a rating on its long-term, unsecured and unsubordinated debt, that can easily entail providing confidential financial information.

Maintaining the confidentiality of the document is not a case of the "State exercising its authority to protect Experian's pecuniary interests." ALJPO at 4. The Commission (the State) acquired the Experian report as part of its regulation of a competitive supplier of gas supply to retail customers. Unlike the public

¹ The ALJPO's suggestion that the presence of the report on e-docket was PE Services' choice is off point. ALJPO at 4. Whether or not the report is on e-docket, it would be publicly available pursuant to Section 551.120(c). Moreover, the ALJ issued a request for information to PE Services in a specific docket. PE Services' response was filed so that there would be a record in support of its request. Interestingly, the ALJPO cites what it calls the "scant record" in a case granting confidential treatment. ALJPO at 2, n 1. Here, PE Services has tried to develop a record.

58 utilities that the Commission regulates, PE Services does not have a franchised
59 service territory and it does not have an exclusive right to serve any customers.
60 It competes with other certificated alternative gas suppliers (“AGS”). The
61 Commission’s protection of information that is not generally available to the
62 public is protecting the interests of the competitive retail gas supply market. If PE
63 Services wants information about its competitors, there is information available in
64 the marketplace, some of it in the nature of analyses that are available only
65 pursuant to contract. Likewise, if an AGS wants information about PE Services
66 meeting the Commission’s financial reporting requirements, it is free to seek that
67 information from the marketplace, whether from Experian or another provider of
68 credit information. The AGS are competing on equal terms.

69 That Experian and other service providers may benefit when their
70 proprietary analyses are not publicly disseminated may be a consequence of
71 granting an AGS’ or Alternative Retail Electric Supplier’s request for confidential
72 treatment, but it would not be the purpose of that decision. But for the potential
73 disclosure of the Report were the Commission to deny PE Services’ petition,
74 other parties would have no access to the Report from anyone but Experian.
75 Bluestar at 996. (“Furthermore, it is undisputed that had the agreement not been
76 disclosed to the ICC, BlueStar would have had no claim to the agreement.”).

77 Accordingly, while it may be possible for a third party to obtain information
78 identical or comparable to the Report, it is not possible to obtain the information
79 through it being publicly available through the State. It is not possible for a third
80 party to obtain such information from Experian other than pursuant to an

81 agreement that imposes terms and conditions on the permissible use of that
82 information. Affording confidential treatment to the Report is appropriate to
83 prevent the dissemination of financial data and analyses that are not generally
84 available to the public.

85 **B. The Request Is Consistent with Commission Precedent**

86 The Commission has protected PE Services' submission of an Experian
87 report in one prior case, which the ALJPO cites. ALJPO at 2. The Commission
88 has also granted confidential treatment of financial information in other cases.

89 For example, in a February 27, 2008 order, the Commission granted a
90 request for confidential treatment of "confidential ratings agency reports"² as part
91 of an annual compliance filing. Commerce Energy Inc., Docket 08-0080 (Order
92 Feb. 27, 2008). In a February 5, 2008 memorandum to the Commission,
93 published on e-docket, the administrative law judge in that case stated that
94 "[s]ince the request is similar to many others, a hearing is waived."

95 In another 2008 order, the Commission granted a request for confidential
96 treatment of "confidential and proprietary ratings agency report information."³
97 Direct Energy Services, LLC, Docket 07-0086 (Order, Jan. 30, 2008).

98 In addition, there is a February 19, 2008 administrative law judge's
99 proposed order in Docket 07-0287 recommending granting a request for
100 confidential treatment of a Dun & Bradstreet report. Spark Energy Gas, LP.

101 The Commission's orders in the referenced dockets and the proposed
102 order do not represent the State protecting ratings agencies' pecuniary interests.

² This description is quoted from the petition.

³ This description is quoted from the petition.

The decisions and proposed order represent protecting information that is confidential and available only under a third party's terms and conditions.

IV. EXCEPTIONS

Exception 1 of Attachment A revises note 1 on page 2 of the ALJPO to address the Commission precedent cited in Sec. III.B of this Brief on Exceptions.

Exception 2 of Attachment A revises pages 3-4 of the ALJPO to address the argument in Sec. III.A of this Brief on Exceptions.

WHEREFORE, Peoples Energy Services Corporation respectfully submits its Brief on Exceptions in this proceeding and requests, for the reasons set forth above, that the ALJPO be revised as shown in Attachment A of this Brief on Exceptions.

Respectfully submitted,
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ATTACHMENT A

EXCEPTION 1

Consistent with its Brief on Exceptions, PE Services proposes to revise footnote 1 on page 2 of the ALJPO as follows: ¹ The vice president's letter also indicates that the Commission previously afforded proprietary treatment to PESC's Experian report in Docket No. 07-0078. In addition, the Commission notes that is has granted confidential treatment of ratings agency reports in two recent order, Docket Nos. 07-0086 (Order issued January 30, 2008) and 08-0080 (Order issued February 27, 2008). ~~The scant record in that proceeding does not bar the Commission from conducting a more thorough review in this proceeding.~~

EXCEPTION 2

Consistent with its Brief on Exceptions, PE Services proposes to revise pages 3 and 4 of the ALJPO, beginning with the first full paragraph on page 3 and continuing to the end of page 4, as follows:

In this situation, PESC filed its Report of Continued Compliance accompanied by a one page Experian commercial score report for which it presently seeks confidential treatment. While PESC argues that disclosure of the information in the Experian report to competitors could harm PESC, counsel for PESC acknowledges that anyone, including PESC's competitors, could obtain the information directly from Experian so long as they pay Experian's fee and agree to Experian's terms and conditions or negotiate some sort of agreement with Experian. ~~For example, the Experian agreement that PESC provided does not permit resale or transfer and limits its use to internal business purposes. Accordingly, it is difficult to see how restricting the public from the Experian report in the Commission's files will prevent PESC's competitors from obtaining the information. If anything, PESC's competitors would simply incur less expense in~~

~~obtaining the information from the Chief Clerk's Office, assuming that they did not already have it from Experian or another of the many organizations that report on a company's credit risk.~~

~~PESC also appears to argue that Attachment A should be kept from the public because its contents may be different from what someone else could purchase from Experian based upon what that person asked for and when they asked for it. Admittedly, Moreover, the information that a competitor may purchase from Experian today or in the future may not be identical to that contained in Attachment A; but that is to be expected since PESC's credit risk is likely to vary from time to time as a result of a myriad of factors. Indeed, the fact that Attachment A may vary from what Experian would produce now if asked by a competitor for an analysis of PESC's credit cuts in favor of not granting Attachment A proprietary treatment since it may already be outdated. The fact that someone might not ask for the same information from Experian as is on Attachment A is not a reason for keeping Attachment A from the public.~~

~~PESC cites Section 5.1 of its agreement with Experian as an additional reason that Attachment A should not be available to the public. Section 5.1 states in its entirety:~~

~~Use of Business Credit Services. Customer hereby certifies and warrants that it will request and use business credit information received from Experian for Customer's own internal business use and not for resale, transfer or redistribution to third parties.~~

~~Section 5.3 of the same agreement, however, allows PESC to divulge the information received from Experian as required by law. PESC chose to comply with Part 551 by providing the Commission with a copy of Experian's commercial score report. Now that the Commission has the Experian report, it is obligated to handle it in compliance with the public access policies of the Commission and the laws of the State. An entity can not be allowed to circumvent those policies and laws by simply making an agreement with another entity not before the Commission to keep certain information confidential. The ramifications of allowing an entity to do so would include the evisceration of the presumption favoring public access to information held by governmental bodies in Illinois. The lack of an exemption, among the many set forth in Section 7 of the FOIA, for information that two entities simply agree to keep confidential indicates that the General Assembly shared this concern.~~

~~The Commission is also not persuaded by PESC's argument concerning Section 5.1 because it is not as if Experian seeks to exclude all but PESC from ever viewing PESC's commercial score report. As noted above, Experian is happy to provide PESC's report to any who pay Experian's fee. A Commission order granting proprietary treatment to Attachment A would be tantamount to the State exercising its authority to protect Experian's pecuniary interests. The~~

~~Commission should not be~~ concludes that it is not bound by PESC's agreement with Experian to maintain the confidentiality of Experian's information because it is not a party to that agreement. However, that conclusion does not mean the information should be publicly available, either on e-docket or in the Commission's Chief Clerk's Office, particularly when others can obtain the information directly from Experian for a fee.

~~With regard to the posting of information on e-Docket, the mere filing of a Report of Continued Compliance pursuant to Part 551 does not initiate a docket and the report is therefore not placed on e-Docket. Such reports are simply stored among the many paper files of the Chief Clerk. In its attempt in the February 22, 2008 letter to justify the grant of proprietary treatment in this proceeding, however, PESC chose to file on e-Docket redacted versions of Attachment A to the Report of Continued Compliance and its agreement with Experian. In a footnote in its February 22 letter, PESC explains that it has marked its agreement with Experian confidential pursuant to Section 11 of the agreement. No other explanation is offered as to what exactly is confidential about the agreement with Experian. PESC is therefore responsible for placing the information on e-Docket knowing that it may not be granted proprietary treatment by the Commission. The fact that e-Docket will facilitate access to the information upon the removal of the proprietary treatment is not a reason to restrict public access.~~

The Commission concludes that the information provided by PE Services to meet its obligation to show continuing compliance with the financial resources requirements of our certification rules is information not generally available to the public. Moreover, that information is available in the market only under terms and conditions established between the provider of the information and a buyer. Although it would be possible for a third party to obtain some sort of report from Experian or others analyzing PE Services' credit, the content of the report and the terms and conditions under which it is available are for Experian and others to decide. The availability in the marketplace of data identical or similar to what PESC submitted to the Commission to fulfill a regulatory requirement does not make it public.

The Commission, having considered the record herein, is of the opinion and finds that:

- 1) PESC is an AGS under Section 19-110 of the Act and Part 551;
- 2) the Commission has jurisdiction over PESC and the subject matter herein;
- 3) PESC has ~~not~~ demonstrated that proprietary treatment is warranted; and

4) PESC's petition should be granted ~~denied~~.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the petition of Peoples Energy Services Corporation seeking proprietary treatment for Attachment A to its January 31, 2008 Report of Continued Compliance is hereby granted ~~denied~~.